U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

File: EAC 99 097 51637 Office: Vermont Service Center Date: MAR - 7 2000

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to § 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(b)

IN BEHALF OF PETITIONER: [redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: This is a motion to reconsider the Associate Commissioner for Examination's decision withdrawing the approval of the nonimmigrant visa petition. The motion to reconsider will be granted and the previous decision of the Associate Commissioner will be affirmed.

The petitioner engages in the repair and service of utility lines for customers throughout New England. The petitioner desires to employ the beneficiaries as journeymen utility construction linemen for a period of one to three years. The beneficiaries will also provide instruction to U.S. apprentice linemen. The Department of Labor determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that a temporary need had been established and approved the petition. The director certified his decision to the Associate Commissioner for Examinations for review. Upon review, the Associate Commissioner withdrew the approval and denied the nonimmigrant visa petition.

On motion, counsel states that the nature of the need in this petition is to hire foreign journeyman linemen only for one year, primarily to train apprentices. Counsel also states that once the training is accomplished, the temporary need for the trainers would have been met.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

> ...An alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), as codified in current regulations at 8 C.F.R. 214.2(h)(6)(ii), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. See 55 Fed. Reg. 2616 (1990).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a

one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. 214.2(h)(6)(ii)(B).

The petition indicates that the employment is a one-time occurrence and the temporary need is unpredictable. The regulation at 8 C.F.R. 214.2(h)(6)(ii)((B)(1) states that for the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish that it will not need workers to perform the services or labor in the future. Counsel states that if the concept of temporariness in this case does not fit into the category of "one-time occurrence", it does meet this test on the grounds of "extraordinary circumstances."

An addendum to the petition states that the duty of the beneficiaries is to help build and maintain high voltage power lines and train U.S. apprentice linemen to become journeyman linemen. The petitioner states that when the three-year program is complete, the U.S. workers would replace the temporary foreign workers. The Department of Labor (DOL) had previously approved labor certification applications submitted by the same petitioner to employ foreign journeyman linemen in 1988, 1989 and 1990.

In this particular case, the DOL found

> "that the employer's temporary need has been reviewed and found not convincing. The employer's need will last at least three years (if not longer) and therefore, these positions are for a long term need in order to complete an on going long term project."

Consequently, DOL denied the temporary labor certificate.

The petitioner states that the temporary need for foreign journeyman linemen to train and create a pool of American journeyman linemen was not expected to recur. The petitioner explains that the situation recurred due to relocation and retirement of those American journeymen linemen. Consequently, the petitioner states that it must once again hire foreign journeyman linemen to complete construction and train new U.S. apprentices. The petitioner's need for the services to be performed by the beneficiaries is thereby found to be ongoing and cannot be classified as duties that will not need to be performed in the future.

Counsel also cites an unpublished decision in support of his argument. However, an unpublished decision carries no precedential weight. See Chan v. Reno, 113 F.3d 1068, 1073 (9th Cir. 1997) (citing 8 C.F.R. § 3.1(g)). As the Ninth Circuit says, "[U]npublished precedent is a dubious basis for demonstrating the type of inconsistency which would warrant rejection of deference." Id. (citing De Osorio v. INS, 10 F.3d 1034, 1042 (4th Cir. 1993)).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the Associate Commissioner will be affirmed.

ORDER: The order of April 29, 1999 withdrawing the approval of the nonimmigrant visa petition is affirmed. The petition is denied.